Filed 3/9/12 P. v. Stevens CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH E. STEVENS, Defendant and Appellant.	A119073 (San Francisco City & County Super. Ct. No. 197439)

INTRODUCTION

This case involves the shooting deaths of a 22-year-old man and his two-year-old son, as well as injury to the child's mother. Joseph E. Stevens, a 28-year-old African American, was tried twice as the killer. The first trial resulted in a hung jury after six days of deliberation. The second trial resulted in his conviction of two counts of first degree murder (Pen. Code, § 187)[1] and one count of firearm assault (§ 245, subd. (a)(2)), as well as a multiple-murder special circumstance finding (§ 190.2, subd. (a)(3)) and firearm use findings on both murder counts (§ 12022.53). Defendant was sentenced to two life terms without possibility of parole for the two murders, plus consecutive terms of 25 years to life for each of the firearm enhancements, and three years for the assault with a deadly weapon.

Defendant asks us to reverse the judgment and dismiss the charges, asserting two grounds: (1) misconduct by one juror, specifically for three comments attributed to her during deliberations; and (2) the prosecutor's destruction of evidence. We conclude that

[1] Statutory references are to the Penal Code unless otherwise specified.

while the juror's conduct was troubling—in one instance undoubtedly misconduct—it was nonprejudicial, and that the trial court addressed this and the other issues and properly rejected them. As to the prosecutor, the trial court implicitly found he did not act in bad faith and, in any event, the claim has been forfeited. We thus affirm.

FACTS

The facts of the crime, although tragic, are fairly straightforward. On October 14, 2005, Dernae Wysinger and his girlfriend, Jazmanika Ridout, drove from their home to the home of Ridout's aunt so their two-year-old son, Naemon Wysinger, could play with the aunt's grandson. They arrived at the aunt's house less than an hour after sunset. They parked in front of the house and Ridout exited the passenger seat. As she was standing next to the car she heard Wysinger[2] say, "Who's that coming with a Ralo?"[3]

Ridout looked up and saw a man dressed all in black, with a black hoodie pulled up over his head, approaching on foot carrying a long black gun with a drum-style magazine. As the man neared their car he fired at least 18 shots from a .223 caliber semiautomatic firearm into and around the car, killing both Wysinger, who was seated in the driver's seat, and the little boy, who was strapped into a child seat in the rear of the car. The spray of gunfire likely lasted less than 20 seconds. When the shooting began, Ridout dropped to the ground and pulled herself forward to avoid being shot. She was nevertheless hit in the hand, leg, and foot by bullets or metal fragments. The murder weapon was never recovered.

The shooter then ran back in the direction from which he had come (toward Missouri Street) and disappeared. Two other witnesses offered information about a possible getaway car. One neighbor who lived on Missouri Street said he saw a black, dark blue, or dark green Volvo station wagon speeding away shortly after he heard the shots fired. Another neighbor on Missouri Street, looking out his window after he heard the shots, saw a dark-skinned African American man, dressed in black and holding a gun,

[2] We refer to Dernae Wysinger as "Wysinger" and Naemon Wysinger as "Naemon."

[3] "Ralo" is slang for a gun.

run to a Chevrolet truck or SUV and get into the rear passenger seat before it sped away. He described the suspect to the police as approximately 20 years old, 5 feet 9 inches to 5 feet 11 inches tall, weighing 170 pounds, with a thin build, wearing all black clothes, and carrying a 9 millimeter handgun.[4]

Ridout, who had known defendant from her neighborhood since her early teens, identified him by name as the shooter at the scene[5] and also in an ambulance on the way to the hospital. She picked out his photo at the hospital from a photo lineup and identified him at trial. Ridout described defendant to police as a light skinned black male with freckles, 5 feet 2 inches to 5 feet 3 inches tall, weighing 130 pounds. Despite the poor lighting and hooded sweatshirt, Ridout claimed she could see defendant's eyes, eyebrows, mouth, and nose as he approached the car. She made eye contact with him and recognized him instantly from his face and the way he walked. She was very confident of her identification.

Ridout was unable to put forth a motive for the shooting, since she had long been close friends with defendant in an almost brother-sister relationship. Defendant and Wysinger had also been on friendly terms. The prosecution hypothesized, however, that defendant shot Wysinger to avenge the killing of defendant's girlfriend's brother, who had been killed by Wysinger's stepbrother, Michael Howard, some 20 months earlier.[6]

The defense was mistaken identity. Other immediate eyewitnesses (three of Ridout's cousins), called by the defense, failed to identify defendant or anyone else as the killer, testifying it was too dark to see who did the shooting. A 13-year-old cousin, however, "guessed" the shooter was "probably" 5 feet 9 inches tall. Another 16-year-old cousin, who was located farther from the shooting scene, said the shooter was 5 feet 7

---

[4] The prosecution's theory was that this was not the shooter, but an accomplice.

[5] The parties stipulated that none of the police reports mentioned that Ridout had identified defendant at the scene.

[6] Howard and Wysinger were not technically stepbrothers, but Wysinger's father and Howard's mother lived together, so many people considered them brothers or stepbrothers.

inches to 5 feet 9 inches and "assumed" he was "probably dark skinned" because if he had been light skinned the witness "probably would have seen a little something." The shooter's hood, he testified, came down to his eyebrows. One adult cousin, who was sitting in the doorway of Ridout's aunt's residence, estimated the gunman was 5 feet 6 inches to 5 feet 9 inches (including his hood) and weighed 175 pounds. She also testified the shooter's hood came down over his eyes and nose.

The defense also presented an expert witness on perception and memory who testified that even a confident eyewitness identification may be erroneous due to factors such as poor lighting, distance, brevity of observation, obstacles to vision, the viewer's expectations, and the filling in of memory gaps with postevent information.

Ridout was placed in a witness protection program after the shooting. In one of defendant's jailhouse telephone conversations he made a statement that could be construed as an offer to pay Ridout $10,000 if she failed to appear in court. In a different recorded jailhouse conversation defendant said, "shit if nigga, if that's what they come with nigga [i.e., a plea bargain of six to eight years], I'm jumpin on it."

This brief summary will suffice for now. To the extent further factual detail is necessary it will be included in our discussion of the issues.

DISCUSSION

Juror Misconduct

Defendant claims that Juror No. 12 in the second trial committed misconduct in three particulars, that: (1) she spoke to her husband about the trial, (2) she conducted independent research into the death of defendant's uncle, and (3) she uttered a racist comment during deliberations. The alleged misconduct was brought to light by other jurors during deliberations.

Factual background

The jury retired to deliberate at lunch time on Tuesday, March 13, 2007. On the morning of Wednesday, March 14, Juror No. 5 expressed discomfort with a comment made by Juror No. 12: "I just want to express a concern. During deliberations yesterday, juror 12 mentioned, I think inadvertently, that she had discussed the case with her

husband. I expressed my concern at that time and her response is, 'Oh, don't worry about it. He's a former peace officer' and mentioned to me—to that—he's been in police something and—and mentioned to me we should stop talking about it. ['']It was early in the whole process, so don't worry about it.['']" The juror questionnaire filled out by Juror No. 12 confirms that her husband is a retired San Francisco deputy sheriff.

The court then questioned Juror No. 12 in chambers, asking whether she had talked to her husband about the case. She responded: "No, I only asked him about the auto auction. That's it. He won't take any questions." She further explained, "I asked him the question, I said, 'Can you go to that auto auction,' which I understand that he did not participate in because of his—I said, 'without a driver's license?' And he said, 'No.' " Her husband then told her "You can't discuss this," and she said, "I know. I was just curious about the auto auction." "I just asked if you can walk in without a driver's license as a young person and buy an auto if you had money. That's all I asked him." She claimed it would not affect her deliberation. Defense counsel declined to make a motion to remove Juror No. 12. The significance of the auto auction testimony will be discussed below.

On the morning of Thursday, March 15, a juror requested to be removed from the jury because she had overheard two people on the bus saying that defense counsel used cocaine. In addition, the testimony concerning Naemon's death had evoked bad memories of being attacked, along with her five-year-old daughter, and her daughter's near death in the hospital afterwards.

The court granted a defense motion to remove the juror, replaced her with an alternate, and jury deliberations began anew. There were no deliberations on Friday, March 16.

On Monday, March 19, four jurors again brought Juror No. 12 to the court's attention. The first was Juror No. 4, who expressed concern that Juror No. 12 may have consulted information not presented in court: "Basically there's four of us who, we were deliberating on Thursday and . . . [¶] [Juror No. 12] made reference to remembering, recalling, hearing about the death of the defendant's uncle that was supposedly killed in

police custody, on TV. We were like, we stopped. And we're like, she's like, 'It was all over the news. Anybody could have seen it.' So we're like, 'Okay. Like how do you know?' We tried to talk to her a little bit. She kind of clammed up, but we felt like we should say something. I don't know if it's that big of a deal or not." Juror No. 4 continued, "She didn't say anything really after that. And she didn't say nothing like, you know, in reference to what she saw on TV. Just that she had seen."

As will be discussed in more detail below, there was uncontroverted evidence that defendant's relative, Aaron Williams, died in police custody following his arrest some years before the current crime.[7]

The same incident was described by Juror No. 2 in the following words: "This is out of an abundance of caution, but during deliberations one of the jurors mentioned that she saw something on TV about Mr. Stevens's Uncle Aaron. And when she said that, we said, 'Okay. Stop right there. We don't want to hear anything more.' So none of us heard, got any information from that, but who knows what, she knows it. It could be absolutely nothing, but we felt that we had to say something." The juror confirmed the event would not affect his or her deliberations, but there was "just a concern of what she knows, and again it could be nothing."

Juror No. 10 also reported the incident, commenting, "I remember her mentioning something and thinking, 'She shouldn't be mentioning that.' "

Juror No. 5 confirmed the others' accounts with additional, and what could be even more troubling, detail: "Well, I guess I would consider it in the larger context, and that's why I'm concerned. [¶] . . . [¶] And so in the larger context, earlier in the week we were having a discussion and out of a very, in a very non sequitur way she started saying something about, this is what she said: 'You can't call these people niggers. They'll just shoot you.' She says that to juror number, I don't know, and I was like, 'What?' We were talking about the language and the culture. [¶] And then Friday [*sic*] we were

[7] In response to defendant's request, we take judicial notice of the fact that Williams died in police custody in 1995, as reported in the news at that time.

talking about Joseph Stevens's uncle who had been shot[8] and he had apparently witnessed or was aware of it, and with a strong conviction she started telling us, 'He's not his uncle. He's not his uncle.' And I was like, she goes, 'Well, you know. There was an article in the newspaper some time back in—' either, one of the jurors quickly said to her, 'Don't say anything more about that.' . . ." Juror No. 5 concluded, "I'm concerned about the bias and the prejudice that's motivating any discussion coming from her. That's my biggest concern."

The court asked each of the remaining jurors individually whether they had heard any of the jurors say they had gained information from outside the trial. Four more said they had. Juror No. 3 said "she said something about a television. About the defendant's uncle something. She didn't say one way, well, actually she sort of did. She said that there was nothing to it and she was kind of immediately hushed down. Like one other juror said, 'I don't think we're supposed to talk about that.' " Juror No. 7 heard Juror No. 12 say something about "having seen something on TV." It wasn't clear whether she saw it "recently [or] remotely." Juror No. 8 also was not "a hundred percent sure of the timing"; it could have been "recent" or "a year or two ago." This juror, too, told the court "those of us that heard her say that basically stopped her and said, 'Don't say anything.' " Juror No. 11, who had been sitting next to Juror No. 12, heard her say "she saw all about" how defendant's uncle got killed "on television . . . a while back." Again, the juror said, " 'Well let's not talk about it.' And that was pretty much it."

Thus, eight of the jurors heard remarks by Juror No. 12 about defendant's uncle that was received from an outside source. There were no accounts of detailed disclosure. Juror No. 12 was quickly silenced and all of the affected jurors said they could set the remarks aside and base their verdicts on the evidence.

The court next questioned Juror No. 12 about her reference to "Aaron Williams and having seen something on TV." She explained, "That was on TV. That was years

[8] There was no evidence that Williams was shot, only that he was "killed" in police custody.

ago.[¶] . . . [¶] I think the police department messed up in the way that he died. It was violent. Yes. That's the only thing that I said." She said she would be able to "set aside" any information she had received from television or any other source and base her opinion "simply on what was presented in court."

The court asked Juror No. 12 no questions about the "niggers" remark or about her specific statement that defendant's uncle was "not his uncle." It also did not question any other jurors about either of those remarks.

Defense counsel moved to discharge Juror No. 12. She noted this was the second time the juror had been brought to the court's attention and expressed concern about the juror's statement that "those people kill each other if they call each other the wrong name or something." She also pointed out the "he's not his uncle" comment. She questioned Juror No. 12's "objectivity," and said the juror appeared to be "making decisions based on things outside the trial," which was counsel's "main concern."

The court took the matter under submission to conduct further research. Deliberations continued on March 20. The court denied the motion to remove Juror No. 12 on Wednesday, March 21, stating that a juror's inability to perform his or her function must be shown "to be a demonstrable reality" and that "wasn't shown."

After the bailiff had received the jury's verdicts, and after the judge had denied the motion, defense counsel reminded the court that Juror No. 12 had used "the 'N' word." The court replied, "she didn't say that. Somebody else said she said that." The judge's ruling did not change. This exchange occurred just before the verdicts were read.

Defendant contends Juror No. 12 was actually biased against African Americans based on her alleged comment about "niggers." He further contends the same juror committed misconduct by discussing the auto auction with her husband and by conducting an independent investigation of the death of defendant's uncle.

Legal principles

The federal and state Constitutions guarantee to the criminally accused a fair trial by a panel of unbiased, impartial jurors. (*People v. Nesler* (1997) 16 Cal.4th 561, 582 (*Nesler*); U.S. Const., amends. VI, XIV; Cal. Const., art. I, § 16; see also, *Irvin v. Dowd*

(1961) 366 U.S. 717, 722; *Ristaino v. Ross* (1976) 424 U.S. 589, 595, fn. 6; *In re Hitchings* (1993) 6 Cal.4th 97, 110.) If even one juror is shown to have been actually biased, a guilty verdict must be reversed as structural error. (*Nesler*, *supra*, 16 Cal.4th at pp. 578-579; *In re Carpenter* (1995) 9 Cal.4th 634, 657 (*Carpenter*).) A defendant is " 'entitled to be tried by 12, not 11, impartial and unprejudiced jurors.' " (*Nesler*, *supra*, 16 Cal.4th at p. 578, quoting *People v. Holloway* (1990) 50 Cal.3d 1098, 1112.)

Jurors take an oath requiring them to "well and truly try the cause" and "a true verdict render according only to the evidence presented . . . and to the instructions of the court." (Code Civ. Proc., § 232, subd. (b).) Evidence against a criminal defendant must " 'come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.' " (*Parker v. Gladden* (1966) 385 U.S. 363, 364; see generally, Code Civ. Proc., § 232.) Section 1089 authorizes the trial court to discharge and replace a juror when the juror is shown to be unable or unwilling to perform his or her duties. (See also, Code Civ. Proc., § 233.)

A juror may be discharged for actual bias, including racial prejudice, as well as for his or her conduct affecting other jurors. "A sitting juror's actual bias, which would have supported a challenge for cause, renders him 'unable to perform his duty' and thus subject to discharge and substitution." (*People v. Keenan* (1988) 46 Cal.3d 478, 532 (*Keenan*).)

"We do not prohibit racial and gender bias in jury selection only to encourage it in jury deliberations. Once seated, a juror should not give free rein to some racial or gender bias of his or her own. The jury system is a kind of compact by which power is transferred from the judge to jury, the jury in turn deciding the case in accord with the instructions defining the relevant issues for consideration. The wise limitation on the authority of courts to inquire into the reasons underlying a jury's verdict does not mean that a jury ought to disregard the court's instructions. A juror who allows racial or gender bias to influence assessment of the case breaches the compact and renounces his

or her oath." (*J.E.B. v. Alabama ex rel. T.B.* (1994) 511 U.S. 127, 153 (conc. opn. of Kennedy, J.).)

Jurors are prohibited by law from discussing the case until all the evidence is in, the court has given its instructions, and the jury has retired to deliberate. (*People v. Wilson* (2008) 44 Cal.4th 758, 838.) They are also specifically prohibited from discussing the case with nonjurors (*ibid.*; *People v. Cissna* (2010) 182 Cal.App.4th 1105, 1111) and from conducting their own investigation and research outside the courtroom (*People v. Conkling* (1896) 111 Cal. 616, 628; *People v. Vigil* (2011) 191 Cal.App.4th 1474, 1484-1485.) Juries are routinely admonished regarding these strictures (§ 1122), and this jury was no exception, having been repeatedly reminded of them throughout the trial.

Juror misconduct occurs when there is a direct violation of the oaths, duties, or admonitions imposed on jurors, such as when a juror conceals bias on voir dire, consciously receives outside information about the case, discusses the case with nonjurors, or shares improper information with other jurors. (*In re Hamilton* (1999) 20 Cal.4th 273, 294.) "Grounds for investigation or discharge of a juror may be established by his [or her] statements or conduct, including events which occur during jury deliberations and are reported by fellow panelists." (*Keenan, supra,* 46 Cal.3d at p. 532.)

To affirm the court's discharge of a juror the record must show inability or unwillingness to serve to a " ' " ' "demonstrable reality." ' " ' " (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.) The rule is intended to protect the defendant's right to a fair and impartial jury by discouraging the elimination of jurors who may be conscientiously opposed to the majority view of the evidence. (*Id.* at pp. 1051-1052.)

When a juror engages in actual misconduct, prejudice is presumed; unless the prosecution rebuts the presumption by proving that no prejudice actually resulted from the misconduct, the defendant is entitled to a new trial. (*Carpenter, supra,* 9 Cal.4th at pp. 651, 654; *People v. Chavez* (1991) 231 Cal.App.3d 1471, 1483-1485.) Whether a defendant has been prejudiced depends upon whether the jury's impartiality has been

adversely affected, the prosecution's burden of proof lightened, or any asserted defense contradicted. (*People v. Zapien* (1993) 4 Cal.4th 929, 994; *People v. Cumpian* (1991) 1 Cal.App.4th 307, 312.)

We defer to actual credibility determinations by the trial court and to its purely factual findings if supported by substantial evidence. Whether the presumption of prejudice has been rebutted is a mixed question of law and fact subject to our independent determination. (*People v. Ramos* (2004) 34 Cal.4th 494, 520 (*Ramos*); *Nesler, supra,* 16 Cal.4th at p. 582.) The prosecution is not required to make an affirmative showing rebutting prejudice; a reviewing court's examination of the whole record may itself dispel any suggestion of prejudice resulting from the misconduct. (*Carpenter, supra,* 9 Cal.4th at p. 657.)

The ultimate question is whether there is a substantial likelihood that any of the jurors were actually biased. (*Nesler, supra,* 16 Cal.4th at pp. 578-579; *Carpenter, supra,* 9 Cal.4th at p. 653.) Actual bias is defined as " 'a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.' " (*Nesler, supra,* 16 Cal.4th at p. 581; Code Civ. Proc., § 225, subd. (b)(1)(C).)

Conversation with husband

The issue regarding Juror No. 12's conversation with her husband about the auto auction is the one instance in which undoubted juror misconduct occurred. Discussing the case with a spouse constitutes misconduct. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1309; *People v. Bell* (2007) 40 Cal.4th 582, 618.) The Attorney General claims, however, the juror's conversation with her husband was "limited and inconsequential," and we agree.

The reference to the auto auction tied in to testimony by Ridout that her car had been broken into two days before the murders while it was parked outside an auto auction. Wysinger accompanied her to the auction along with her friend, Kallicia Bradley. They were looking for a car for Bradley, but Bradley was not allowed to enter the auction because she did not have photo identification. While waiting outside, Bradley

saw defendant and Ulysses "Bam Bam" Powell parked nearby in a black Volvo station wagon, model year 2000 or newer.

When the trio returned to Ridout's car after the auction, they found a rear passenger window had been smashed and her car registration, as well as the car stereo and CDs, had been stolen. Ridout suspected defendant was involved in the auto break-in. There was some indication that Powell may not have been on good terms with Wysinger. The testimony about the auto auction was relevant primarily because Bradley's testimony associated defendant with a black Volvo, which was similar to one description of a possible getaway car after the shooting.

When a juror receives information about a party or the case from extraneous sources, the verdict will be set aside only if there appears a substantial likelihood of actual juror bias. (*Nesler*, *supra*, 16 Cal.4th at pp. 578-579; *Carpenter*, *supra*, 9 Cal.4th at p. 653.) "Such bias may appear in either of two ways: (1) if the extraneous material, judged objectively, is so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror; or (2) even if the information is not 'inherently' prejudicial, if, from the nature of the misconduct and the surrounding circumstances, the court determines that it is substantially likely a juror was 'actually biased' against the defendant." (*Nesler*, *supra*, 16 Cal.4th at pp. 578-579.) If we find a substantial likelihood that a juror was actually biased, we must set aside the verdict, no matter how convinced we might be that an unbiased jury would have reached the same verdict, because a biased adjudicator is one of the few structural trial defects that compel reversal without application of a harmless error standard. (*Id*. at p. 579.)

"To be sure, once actual bias is found, the strength of the evidence is irrelevant; the verdict must be set aside. But such evidence is relevant in determining bias in the first place." (*Carpenter*, *supra*, 9 Cal.4th at p. 655.) The court may consider "the nature of the juror's conduct, the circumstances under which the information was obtained, the instructions the jury received, the nature of the evidence and issues at trial, and the strength of the evidence against the defendant." (*Id.* at p. 654.)

We are obliged to find there was misconduct by Juror No. 12 in consulting her husband about the auto auction identification requirements, and the presumption of prejudice therefore arises. However, we find that presumption was rebutted in this case.

Where a juror's conversations with a non-juror are on non-substantive or trivial matters, the presumption of prejudice may be rebutted. (*People v. Lewis, supra*, 46 Cal.4th at p. 1309 [misconduct harmless where juror told her husband only how jury chose a foreman and other nonsubstantive matters]; *People v. Stewart* (2004) 33 Cal.4th 425, 509-510 [misconduct harmless where juror complimented the appearance of defendant's former girlfriend, a trial witness].)

The husband's input here was not the kind of inherently inflammatory information that would be expected to influence other jurors to violate their oaths. Other cases of jury contamination have involved information much more damaging to the defendant. (E.g., *Nesler, supra*, 16 Cal.4th at pp. 565, 567, 569, 572, 575, 584 [juror overheard woman in bar say defendant abused drugs and was not a good mother, where her role as a mother was central to her defense; held prejudicial misconduct]; *Carpenter, supra*, 9 Cal.4th at pp. 642, 647 [juror learned defendant had been convicted of capital crimes and sentenced to death in a different county; held misconduct but not prejudicial]; *Cissna, supra*, 182 Cal.App.4th at p. 1111 [juror's discussions with nonjuror friend were "pervasive, focused on deliberative matters concerning the merits of the case, and included discussions of defendant's decision not to testify"].)

The misconduct in our case pales by comparison. The question whether a driver's license was required to enter the auto auction or to purchase a vehicle was not material to a contested issue and was not inflammatory so as to be "substantially likely to have influenced a juror." (*Nesler, supra*, 16 Cal.4th at pp. 578-579.) The specific issue of the form of identification required to enter the auto auction had little or no bearing on the ultimate issues, and there was no conflict in the testimony on the issue. The juror's extraneous information did not lighten the prosecution's burden of proof. And though the evidence of defendant's guilt was not "overwhelming," it was strong, as will be discussed below.

Moreover, Juror No. 5's own reaction to the misconduct minimizes any concerns we might otherwise have about its effect on other jurors. He or she "expressed . . . concern" as soon as the conversation with the husband came up, and Juror No. 12 quickly agreed they "should stop talking about it." Such a response by a fellow juror may be considered for its effect in minimizing prejudice from the disclosure. (*People v. Thomas* (February 23, 2012, S048337) __ Cal.4th __ [where jury only momentarily discussed murder of a witness's wife, no substantial likelihood any juror was biased]; *People v. Loker* (2008) 44 Cal.4th 691, 749 [jury foreman reminded all jurors of their oath and prevented further disclosure].) We therefore find no substantial likelihood of actual bias on the part of jurors other than Juror No. 12.

We still must examine the nature of the misconduct and the surrounding circumstances to determine whether there is a substantial likelihood that Juror No. 12 herself was actually biased against defendant. (*Nesler, supra,* 16 Cal.4th at p. 580.) We also find no substantial likelihood of such bias. Although she knowingly violated the court's admonition, she sought corroboration on a minor factual issue in a long trial. And unlike the juror in *Carpenter, supra,* 9 Cal.4th at pp. 642-643, whose husband actively engaged her in discussion of the case over a long period of time, the husband in our case reminded the juror of her obligation not to discuss the case and cut off such discussion soon after it was initiated.

Besides, the information Juror No. 12 obtained from her husband was not materially different from the evidence introduced at trial.[9] Where extraneous evidence obtained by a juror was "substantially the same as evidence and argument presented to the jury in court," it has been found to be nonprejudicial. (*In re Malone* (1996) 12 Cal.4th 935, 964.)

---

[9] Ridout testified a photo identification was required to enter the auction, but not necessarily a driver's license. Both she and Bradley testified that Bradley had neither form of identification and was not allowed to enter. The defense called the custodian of records for Auto Return, which conducted the auction, who testified that "some sort of picture ID" was required to purchase a car, but "we do not require a driver's license." He was not asked whether such identification was required to enter the auction.

Finally, unlike the juror in *People v. Bell*, *supra*, 40 Cal.4th at p. 615, who admitted she could no longer be impartial, Juror No. 12 told the court she could set aside any extraneous information and base her verdict on the evidence at trial. The trial court evidently credited the juror's answer, allowing her to remain on the jury and questioning no other witnesses about the extrajudicial conversation. We defer to that implicit credibility determination. Defense counsel also did not initially move to have the juror discharged, which shows that she, too, considered the misconduct nonprejudicial.

Defendant argues the presumption of prejudice is not rebutted here because the evidence against him was weak and there was a significant potential of misidentification. He points specifically to discrepancies in the witnesses' identification testimony, the paucity of corroborating evidence, and the long jury deliberations.

He argues his conviction turned almost entirely on the accuracy of Ridout's identification testimony, even though it differed from the descriptions given by the three cousins. Thus, Ridout estimated the shooter's height at 5 feet 2 inches to 5 feet 3 inches, while the cousins described him as being 5 feet 6 inches to 5 feet 9 inches, and one witness on Missouri Street described a man fleeing the scene who may have been as tall as 5 feet 11 inches. (But see fn. 4, *ante*.) Ridout also estimated his weight at 130 pounds, whereas one cousin and the witness from Missouri Street placed the man in black more in the range of 170 to 175 pounds.

The discrepancies in the descriptions lose some of their force, however, when considered in light of the whole record. Police officers testified defendant is actually 5 feet 6 inches to 5 feet 7 inches and 160 pounds, more closely matching the descriptions given by other witnesses.[10] Evidently Ridout was not good at estimating height and weight, but she had consistently identified defendant by name and by photo. The jurors were able to view defendant in the courtroom and could have assessed the discrepancies in that light.

[10] Mugshots and DMV records show defendant's height as 5 feet 4 inches to 5 feet 7 inches and his weight as 145 to 160 pounds.

Defendant's expert also confirmed the commonsense truism that Ridout's identification, based upon prior friendship with defendant, was more likely to be accurate than a witness identifying a stranger. And, although Ridout could not estimate the distance at which she recognized defendant, a trajectory analysis showed the first shot to hit the car was most likely discharged at 10 to 20 feet from the driver's door, with Ridout standing just outside the passenger door.[11] Thus, the physical evidence tended to show that Ridout was close enough to be able to reliably identify defendant.

Ridout's identification is further strengthened by her superior viewpoint, directly facing the shooter with her attention focused on him as the one who was "coming with a Ralo." This factor would improve the likelihood of a correct identification according to the defense expert. The other eyewitnesses had not heard Wysinger's question and, prior to hearing the shots fired, would have had no reason to be focused on the shooter.[12]

Two of the cousins were also farther from the scene. The third, sitting in a car, did not get a full face look at the shooter. In addition, there is no evidence that the two younger cousins knew defendant or would have recognized him.[13]

A radio frequency expert testified for the prosecution about the pattern of defendant's cell phone calling and the area he was likely in at the time of the calls. The

---

[11] If fired at 40 feet from the vehicle, the muzzle of the rifle would have had to be 6 feet 4 inches off the ground, above the shooter's head. If fired from 30 feet away, the muzzle would have been 5 feet 3 inches off the ground. If fired from 20 feet away, the muzzle would have been 4 feet 2 inches off the ground, at mid-chest height. If fired from 10 feet away it would have been at waist level. Ridout testified defendant had the gun at waist level when he began firing, and others also testified it was held "low," in the stomach area, or "lower chest" area, uniformly lower than shoulder level.

[12] One cousin was sitting in a parked car listening to a CD. Although the shooter passed close by her, by the time she heard the first shot and turned to look she could only see the side of his face. Another cousin was sitting on the aunt's porch smoking a cigarette; her view of the shooter as he approached was blocked until he got close to Ridout's car, when she saw his face at an angle. The third cousin, along with two friends, was just coming out of the rear of a nearby daycare center, heading home after a visit to a neighborhood store.

[13] There was evidence the adult cousin met defendant on five or more prior occasions while in Ridout's company, but no evidence she saw him on a regular basis.

cell phone records do not establish his actual presence at the scene, but they confirm he was in the general area shortly before the crime was committed and left shortly thereafter.

True, the jury's deliberation spread over six days, but on the third day a juror was replaced by an alternate, and deliberations began over again. When time for a major readback of testimony is deducted, the reconstituted jury actually deliberated approximately 17 to18 hours before reaching verdicts. This duration, while lengthy, does not convince us, in light of the other factors discussed above, that either Juror No. 12 or any other juror was influenced by the juror misconduct. (Cf. *People v. Houston* (2005) 130 Cal.App.4th 279, 300-301 [deliberations spread over four days not indicative of close case in complicated trial]; *People v. Walker* (1995) 31 Cal.App.4th 432, 439 [6.5 hour deliberation after 2.5 hour trial may simply have reflected jury's "conscientious performance of its civic duty"].)

This 20-day trial was not simply a credibility contest among conflicting eyewitness accounts, as defendant tends to characterize it. It included expert testimony on both sides, cell phone records, trajectory analysis, 125 prosecution exhibits, and approximately 50 defense exhibits. The jury may have spent considerable time discussing the circumstantial evidence, as well as rejecting the prosecution's theory that the shooting of Ridout was attempted murder, finding defendant guilty of only assault with a deadly weapon on that count. Given the complexity of the evidence, the deliberation was not unduly long.

Independent investigation of Aaron Williams incident

The second alleged act of misconduct by Juror No. 12 involved her possible independent investigation into the death of defendant's uncle, including the nature of defendant's family relationship with Williams.

The testimonial references to Williams occurred during the defense case via the testimony of a defense attorney whom defendant contacted before his arrest. Defendant called her a day or two after the shooting, wanting to turn himself in to the police. He was afraid to surrender on his own, she testified, because a relative of his, Williams, had

been killed some years earlier while in police custody following an arrest.[14] The witness did not identify Williams as defendant's uncle, but defense counsel so referred to him in closing argument. The exact nature of the familial relationship between Williams and defendant was immaterial.

Many jurors confirmed that Juror No. 12 said something about having seen newspaper or television reports relating to Williams at some time in the past. None offered information that Juror No. 12 had actively investigated the matter during trial. One juror remembered her saying, "He's not his uncle. He's not his uncle." Beyond that the jurors could remember little detail about her remarks and none reported being affected by them.

After Juror No. 12 initially broached the subject, the other jurors told her, "Stop right there. We don't want to hear anything more." She "clammed up", and "none of [the other jurors] . . . got any information" about what she remembered.

A juror's reading news accounts relating to the trial is misconduct. (*Ramos*, *supra*, 34 Cal.4th at pp. 517-519; *People v. Holloway*, *supra*, 50 Cal.3d at p. 1108.) The same applies to conducting Internet or other forms of research about the case. (*People v. Collins* (2010) 49 Cal.4th 175, 255-256.)

The Attorney General claims no misconduct occurred because whatever Juror No. 12 knew "was on TV. . . . years ago." Moreover, it is arguable that if any bias were inspired by the news piece Juror No. 12 remembered, it tended to favor defendant: she expressed the opinion that "the police department messed up in the way that he died." Thus, the Attorney General contends, any misconduct was at most "limited and inconsequential," not meriting reversal.

When it surfaces during trial that a juror possesses personal information relevant to the case which was obtained outside the evidence, the court is required to conduct whatever inquiry is "reasonably necessary to determine if the juror should be discharged

[14] Counsel stipulated that defendant had six prior police contacts and none of them resulted in his being injured.

and whether the impartiality of other jurors has been affected."[15] (*People v. McNeal* (1979) 90 Cal.App.3d 830, 839 (*McNeal*).) But " 'a hearing is required only where the court possesses information which, if proven to be true, would constitute "good cause" to doubt a juror's ability to perform his duties and would justify his removal from the case. [Citation.]' " (*People v. Cleveland* (2001) 25 Cal.4th 466, 478 (*Cleveland*); see also, *People v. Brown* (2003) 31 Cal.4th 518, 582 [court acted within discretion in not holding hearing].) "[O]nly when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred" is an evidentiary hearing called for. (*People v. Hedgecock* (1990) 51 Cal.3d 395, 419.)

The depth of the required inquiry is difficult to gauge in the abstract and difficult to implement in practice. "Determining whether to discharge a juror because of the juror's conduct during deliberations is a delicate matter, especially when the alleged misconduct consists of statements made during deliberations. Evidence Code section 1150, while rendering evidence of the jurors' mental processes inadmissible, expressly permits, in the context of an inquiry into the validity of a verdict, the introduction of evidence of 'statements made . . . within . . . the jury room.'[16] . . . [H]owever, . . . such evidence 'must be admitted with caution,' because 'statements have a greater tendency than nonverbal acts to implicate the reasoning processes of jurors.' [Citation.] But statements made by jurors during deliberations are admissible under Evidence Code section 1150 when 'the very making of the statement sought to be admitted would itself constitute misconduct.' " (*Cleveland*, *supra*, 25 Cal.4th at p. 484.)

---

[15] Section 1120 provides: "If a juror has any personal knowledge respecting a fact in controversy in a cause, he or she must declare the same in open court during the trial. If, during the retirement of the jury, a juror declares a fact that could be evidence in the cause, as of his or her own knowledge, the jury must return into court. In either of these cases, the juror making the statement must be sworn as a witness and examined in the presence of the parties in order that the court may determine whether good cause exists for his or her discharge as a juror."

[16] The admissibility of evidence under Evidence Code section 1150 is not at issue here; it applies only to postverdict inquiry and not to an inquiry conducted during jury deliberations. (*Cleveland*, *supra*, 25 Cal.4th at p. 485.)

The court's inquiry must include an investigation of underlying factual matters, not simply the juror's reassurance that he or she can act impartially. "It is not enough for the juror alone to evaluate the facts and conclude that they do not interfere with his or her impartiality. . . ." (*McNeal, supra,* 90 Cal.App.3d at p. 838.)

Yet, a "trial court's inquiry into possible grounds for discharge of a deliberating juror should be as limited in scope as possible to avoid intruding unnecessarily upon the sanctity of the jury's deliberations. The inquiry should focus upon the conduct of the jurors, rather than upon the content of the deliberations. Additionally, the inquiry should cease once the court is satisfied that the juror at issue is participating in deliberations and has not expressed an intention to disregard the court's instructions or otherwise committed misconduct, and that no other proper ground for discharge exists." (*Cleveland, supra,* 25 Cal.4th at p. 485.) And although the attorneys for the parties need not be allowed to question deliberating jurors, "the court may allow counsel to suggest areas of inquiry or specific questions to be posed by the court." (*Ibid*.) Finally, the reaction of the other jurors may help to dispel any inference that bias infected the deliberations. (*People v. Loker, supra,* 44 Cal.4th 691, 749 .)

Defendant argues we may infer Juror No. 12 did independent research on the death of Williams because it is unlikely she could have remembered the event from anything she read or saw 12 years earlier. We are unwilling to draw that inference. Juror No. 12 herself told the court her information was gained from "TV. . . . years ago." As the longtime wife of a law enforcement officer she may have taken special notice of the Williams incident and stored certain aspects of it in her memory, accurately or otherwise.

Defendant focuses especially on the "he's not his uncle" statement as reflecting information not likely to have been remembered 12 years after the fact. By isolating the court's failure to inquire about that specific statement, defendant argues the court conducted no inquiry whatsoever. But an inquiry was conducted into the broader issue of improper interjection of information obtained outside the trial. We therefore deal not with the total failure to inquire into the underlying facts, but whether the inquiry went far enough. This is inherently a matter of trial court discretion that will not be second

guessed in the absence of abuse. (*People v. Clark* (2011) 52 Cal.4th 856, 971; *Cleveland, supra,* 25 Cal.4th at p. 478**.**)

Moreover, Juror No. 12's "not his uncle" remark, while peculiar as reported, could have been an attempt to point out there was no testimony to support the uncle-nephew relationship. The only witness to testify on the issue said Williams was a "relative"; the exact relation between the two men was not established. The defense attorney's reference in argument to the uncle-nephew relationship therefore should have been disregarded by the jurors, and certainly it would not have been improper for Juror No. 12 to remind the other jurors of that. So interpreted, the juror's remark would not have been misconduct and would not reflect any outside knowledge of the case.

In *McNeal, supra*, 90 Cal.App.3d 830, the juror's impartiality was challenged on the basis of her claimed personal knowledge about the testimony of a defense witness, including that it " 'definitely had a bearing on the way she [would] vote.' " (*Id.* at p. 835.) The next morning the foreman reported the juror " 'just broke down and said . . . she had too much to lose, and it would definitely affect her decision now.' " (*Id.* at p. 836.)

The juror herself, in response to cursory inquiry by the court, said, " 'I still can't find that I can say "guilty" when I can't believe it.' " (*McNeal, supra,* at p. 836.) The court, with no further inquiry, asked her if she could set her extrajudicial information aside. When she said she could she was allowed to remain on the jury. (*Ibid.*)

Division Three of this court held such a reassurance of impartiality by the juror was not alone a sufficient response without an inquiry into the underlying facts and without considering additional input that might be provided by other jurors. (*McNeal, supra,* 90 Cal.App.3d at pp. 838-839.) The trial court's "cursory questioning" was deemed inadequate in light of the juror's "provocative comments" and her own reported statements that she could not deliberate fairly. (*Id.* at p. 839.) The inquiry conducted by the court in our case was not so truncated.

Juror No. 12 was quickly silenced by the other jurors and evidently abided by their admonition not to mention the matter further. There was no evidence of an improper

investigation by Juror No. 12. Every other juror told the court the minimal information conveyed before Juror No. 12 was silenced would not affect their deliberations. The court's inquiry was adequate to dispel any perception of possible bias with respect to the other jurors.

Of remaining concern, however, is the effect such information (or misinformation) may have had on Juror No. 12 herself. Even if Juror No. 12's belief about the uncle-nephew relationship derived from new reports some 12 years earlier, we must consider whether the recollection—accurate or inaccurate—was substantially likely to have tainted her deliberation on the issues at trial. Even reliance on outside information gained years earlier would have been a violation of her oath as a juror. (Code Civ. Proc., § 232, subd. (b); see *Nesler*, *supra*, 16 Cal.4th at p. 579 [" 'juror misconduct' " need not be "blameworthy"]; *People v. Zapien*, *supra*, 4 Cal.4th at p. 994 [even inadvertent receipt of new information concerning defendant is deemed "misconduct" triggering presumption of prejudice].)

When we review the adequacy of the court's inquiry, we apply an abuse of discretion standard. (*Cleveland*, *supra*, 25 Cal.4th at p. 478; see also, e.g., *People v. Beeler* (1995) 9 Cal.4th 953, 989 ["The court's discretion in deciding whether to discharge a juror encompasses the discretion to decide what specific procedures to employ including whether to conduct a hearing or detailed inquiry"]; *Keenan*, *supra*, 46 Cal.3d at p. 539 [courts enjoy "broad discretion as to the mode of investigation"]; *People v. Delamora* (1996) 48 Cal.App.4th 1850, 1856 ["Clearly, it is up to the trial court to determine the appropriate procedure to follow when a question arises about a juror's continued service"].)

We find no such abuse in this case. Juror No. 12's assurance that she could comply with her oath implicitly included a promise to disregard whatever information she had received from outside sources, including her belief about the uncle-nephew relationship—or lack thereof. The trial court accepted her renewed statement of intent to abide by her oath, and we defer to that credibility assessment. (*Nesler*, *supra*, 16 Cal.4th at p. 582.) "Because it is impossible to shield jurors from every contact that may

influence their vote, courts tolerate some imperfection short of actual bias." (*Ramos, supra,* 34 Cal.4th at p. 519.)

On this record we cannot find actual misconduct and we do not find the court's inquiry inadequate under an abuse of discretion standard. Even if there was misconduct, we would not deem it prejudicial for the reasons discussed above.

Racial bias

The issue of juror misconduct of greatest potential concern is that Juror No. 12 was attributed with making a comment tinged with racial bias: "You can't call these people niggers. They'll just shoot you." Such a statement, standing alone, could imply that Juror No. 12 thought people of other cultures *ought to* be able to call blacks "niggers" or that she herself had an inclination to call them that. Thus, it could betray in the juror "a state of mind . . . in reference to . . . [one] of the parties" that may have prevented her from acting "with entire impartiality, and without prejudice to the substantial rights" of the defendant. (*Nesler, supra,* 16 Cal.4th at p. 581.)

Defendant argues Juror No. 12's statement was "overtly racist" with no "benign, non-racist way to interpret it." He also argues the juror's use of the term "these people" constituted a racist statement. But the alleged remarks did not appear to attribute a violent disposition to all African Americans, nor did it suggest "these people" are prone to violence because of their race. We are unwilling to construe the remarks as defendant suggests. While it is difficult to justify use of the word "niggers" in any context, such language would only amount to misconduct if it inflamed the other jurors to violate their oaths or if it reflected the juror's own lack of impartiality. We see neither.

Of course, racial epithets have no place in a jury's deliberations if volunteered by a juror as a reflection of his or her own prejudice. The courts have long expressed concern about racist statements that constitute an expression of bigotry by a juror or that might influence other jurors, especially use of the word "nigger." (*Andrews v. Shulsen* (1988) 485 U.S. 919, 920 (opn. of Marshall, J, dis. from den. of cert.) [napkin with drawing of man on gallows, reading "Hang the Niggers"]; *United States v. Henley* (9th Cir. 2001) 238 F.3d 1111, 1119-1121 (*Henley*) ["niggers are guilty" and "[a]ll the niggers

should hang"].) Verdicts have been overturned for that reason, or cases remanded for further hearings, especially where the juror's comment was specific to a party, linked a racial or ethnic group to criminal tendencies, or was accompanied by other misconduct. (See *United States v. Heller* (11th Cir. 1986) 785 F.2d 1524, 1525-1527 [anti-Semitic and racist comments by jurors]; *Williams v. Price* (3d Cir. 2003) 343 F.3d 223, 227, 233-234, 239 [remand for hearing where juror made racist statements to trial witness after trial]; *State v. Jones* (La.App. 2009) 29 So.3d 533, 535, 540 [conviction reversed where juror used word "nigger" during deliberations]; *State v. Varner* (Minn. 2002) 643 N.W.2d 298, 305 [juror told other jurors a racially insensitive anecdote]; *Powell v. Allstate Ins. Co.* (Fla. 1995) 652 So.2d 354, 357-358 [case remanded for hearing on racial comments by jurors about litigants]; *Jones v. State* (Tex.Crim.App. 1932) 54 S.W.2d 145, 146 [juror called defendant a "bad and dangerous nigger" and related to deliberating jury outside evidence of defendant's misconduct].)

We note, however, that Juror No. 5 did not report the supposedly racist comment when it first occurred. Rather, he or she said it had come up "earlier in the week" preceding the colloquy in which it was reported. In other words, Juror No. 5 waited at least five days to report the allegedly racist remark. This suggests it was not seriously troubling when it occurred. Juror No. 5 was not shy about promptly reporting perceived improprieties: he or she was the juror who reported the first transgression by Juror No. 12, when she consulted her husband about the auto auction, as well as being one of the four who reported the "Uncle Aaron" comments. Having felt comfortable enough to bring forward other forms of suspected misconduct, it is significant to us that Juror No. 5 did not promptly report the allegedly racist comment.

We also find it significant that no other jurors reported the remark, even though each of them had the opportunity to meet privately with the judge and counsel when the "Uncle Aaron" issue came to light. Though the judge did not question the jurors about any racist comments during deliberations or any racial bias they might have perceived among the other jurors, they certainly all had an opportunity to voice concerns about such matters during their individual meetings with the court on March 19. That no other juror

reported any such problem suggests to us either that Juror No. 5 was mistaken about the content of the remark or (more likely) that the remark—whatever its exact content—was deemed inoffensive by the other jurors in the context of their deliberations.

Considered in context, Juror No. 12's comment does not appear to be an expression of her own bias or use of an epithet drawn from her own vocabulary. Rather, having been made while discussing "the language and the culture" of defendant and his associates, the remark is most sensibly construed as a reference back to the language used by defendant in the taped jailhouse telephone conversations.

In one recorded phone call defendant called the person to whom he was speaking "nigga"; his associate on the other call referred to a third party—evidently a mutual friend—as "that nigger." The recorded conversations suggest the word was considered an acceptable way for these individuals to address one another and was not offensive to these young men. Juror No. 12 could have been expressing disapproval of such language, opining that defendant and his friends would not tolerate use of that epithet by those outside their culture. Certainly jurors may refer to or repeat portions of the testimony and comment upon it during deliberations.

There was also testimony about a spate of violent deaths and shootings among the acquaintances of Ridout and Bradley and, inferably, defendant.[17] The comment "they'll just shoot you" appears to have been a reference to the violent milieu in which defendant lived and nothing more sinister. We would not be justified in finding Juror No. 12's remark involved actual bias against African Americans or an attribution of race-based violent tendencies. Given the context described by Juror No. 5, if the words were indeed spoken they most likely amounted to a comment on the evidence and not misconduct.

[17] Besides Powell, there was evidence that Wysinger may have had other enemies, including individuals named "Mikey" or "Black Mike," Kedon, and Marvel. The bad blood among these individuals seemed to stem from the earlier killing of Mikey's brother Sean, and Marvel's brother Montrel. Bradley also testified about violence in the community.

Juror No. 12 appears to have been linking bad language to a propensity for violence.[18] We cannot say belief in such a link is irrational or racist.

Our interpretation is confirmed by that of defense counsel, who moved to discharge the juror in part on the grounds that Juror No. 5 accused Juror No. 12 of saying "those people kill each other if they call each other the wrong name or something." This was undoubtedly a reference to the "niggers" remark, and the judge therefore had that in mind when ruling on the motion to remove Juror No. 12. Moreover, defense counsel's characterization of the incident shows that she, too, considered the reference to "niggers" to relate to name-calling triggering violence, not to Juror No. 12's own racist sentiments.

We are also mindful that inquiry into a juror's racial attitudes in the midst of deliberations is a sensitive matter that arguably threatens the sanctity of the jury's discussions and may even affect the juror's continued ability to serve. (Cf. *People v. Lynch* (2010) 50 Cal.4th 693, 738-740, 743-745, overruled on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610 [court's inquiry about juror's use of alcohol so upset juror that he became unable to continue deliberations and was removed for cause].) The experienced judge who presided over the trial in this case was in the best position to determine how to handle Juror No. 5's complaint, having spent 20 days taking testimony with the opportunity to observe the jurors' demeanor and interactions. We are loathe to call her reaction an abuse of discretion from our less immediate vantage point.

In *People v. Fuiava* (2012) 53 Cal.4th 622, our Supreme Court recently recognized that a court inquiring into possible juror misconduct—even without the racial overtones present here—may find itself "between a rock and a hard place" in that it must

[18] Defense counsel was evidently worried that defendant would be viewed in a negative light because of the language he used in his recorded phone calls. On voir dire she asked jurors whether they listen to "hip hop or rap music," asking what they "think about some of the lyrics," and specifically asking "if you hear that kind of speech in this trial, would that automatically make you . . . have negative feelings towards the speaker . . .?" She then asked a prospective juror who acknowledged listening to such music, "sometimes they use words that may appear offensive to some people, and I think you know what word I'm thinking of, hearing that . . . would you hold that against the person that perhaps talks like that?"

avoid being "too cursory" while at the same time taking care not to "intrude too deeply into the jury's deliberative process in order to avoid invading the sanctity of the deliberations or creating a coercive effect on those deliberations." (*Id.* at pp. 710-711.) It noted that the course before the court in such circumstances is "fraught with the risk of reversible error at each fork in the road." (*Id.* at p. 710.) Indeed, the extent to which a court may inquire into a juror's racial prejudice has been the subject of some controversy, due to the tension between a defendant's right to a fair trial free of racial bias and the sanctity of the jury's deliberations.[19] (Compare *Henley*, *supra*, 238 F.3d at pp. 1121-1122 with *United States v. Villar* (1st Cir. 2009) 586 F.3d 76, 83-84.) We believe a more pointed inquiry by the court would have been allowable under California law. (Cf. *People v. Barnwell, supra,* 41 Cal.4th at p. 1051 [juror predisposed to doubt law enforcement testimony]; *People v. Burgener* (1986) 41 Cal.3d 505, overruled on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743, 753 (*Burgener*) [juror suspected of smoking marijuana]; *People v. Perez* (1992) 4 Cal.App.4th 893, 908, fn. 13 (*Perez*) [California law more liberally allows such evidence than federal law].) Whether the failure to inquire more directly is reversible error is another question.

We would not hesitate to overturn a conviction if we believed it was arrived at by a jury tainted by racial prejudice. But it is also a serious thing to charge an individual with being a racist. We are reluctant to so stigmatize a juror who has had no opportunity to explain or defend her alleged remarks, and we will not assume misconduct where none has been shown. As in *McNeal*, "What [the tainted] [j]uror . . . knew and what she meant

---

[19] Defendant relies heavily on *Henley*, *supra*, 238 F.3d 1111, where a juror had allegedly said, "niggers are guilty" and "[a]ll the niggers should hang." (*Id.* at pp. 1113-1114.) But the court in that case did not hold there had been misconduct; it held simply that evidence of racist statements by a juror was admissible "for the purpose of determining whether the juror's [voir dire] responses were truthful" where the "juror has been asked direct questions about racial bias during voir dire, and has sworn that racial bias would play no part in his deliberations . . . ." (*Id*. at p. 1121.) The Ninth Circuit did not reverse the judgment in *Henley*, but merely remanded the case for further evidentiary development. (*Id.* at p. 1122.)

by her statements are not a part of the record. We cannot assume that . . . she was guilty of misconduct . . . ." (*McNeal*, *supra*, 90 Cal.App.3d at p. 839.)

Although the court's questioning could have been more precisely directed toward discovering evidence of Juror No. 12's possible racism, we do not find the failure to conduct a more piercing inquiry was an abuse of discretion here. The offending comment by Juror No. 12 was a single remark in the context of a long trial and deliberation, reported by only one other juror. Both the defendant and the victims were black. The epithet was not directed at defendant and did not reflect an opinion on the likelihood of his guilt. It appears to have been a comment on the language and culture of a certain segment of the black population. Without more we cannot conclude Juror No. 12 harbored racial prejudice toward African Americans in general or that she allowed such prejudice to affect her verdict. Much less are we convinced that her solitary remark influenced other jurors. Faced with this lack of a clear record, we are unwilling to infer that Juror No. 12's statement reflected actual bias on her part or infected the jury with racism.

Defendant likens his case to *McNeal*, *supra*, 90 Cal.App.3d 830 and *Burgener*, *supra*, 41 Cal.3d 505. As recited above, in *McNeal* there were clear red flags, not only about the juror's possession of outside information, but about its possible effect on the verdict: the juror reportedly said in deliberations that it " 'definitely had a bearing on the way she will vote.' " (*McNeal*, *supra*, 90 Cal.App.3d 835.) *McNeal* therefore concluded "the court's failure to make an appropriate inquiry into the facts in order to determine whether they constituted good cause for discharge of the juror constitutes reversible error." (*Id*. at p. 840.) But *McNeal* does not hold that an inadequate inquiry will invariably lead to reversal.

The Supreme Court in *Burgener*, *supra*, 41 Cal.3d 505 distinguished *McNeal*, holding the suspected misconduct of a juror did not require reversal where (1) the defense attorney expressed a preference not to question the juror, which may have been a tactical decision; and (2) the record on appeal was insufficient to establish actual juror misconduct. (*Burgener, supra,* at p. 521.)

We follow the rationale of *Burgener* in declining to reverse a conviction where the record does not establish misconduct, but only the possibility of misconduct, and where defense counsel acquiesced in the scope of the court's inquiry. Because the record on appeal in *Burgener* "provide[d] insufficient evidence to evaluate a claim" of juror misconduct, reversal on appeal was inappropriate and a habeas corpus petition was deemed the appropriate remedy. (*Id*. at pp. 521-522.) A similar analysis applies here.

When Juror No. 12's "niggers" comment was specifically brought to the court's attention, it said, "she didn't say that. Somebody else said she said that." This appears to be a finding that Juror No. 5's accusation was not credible, or at least the judge's assessment that Juror No. 12's statement did not amount to misconduct. Since only one juror mentioned the use of this language, though all were questioned about Juror No. 12's alleged misconduct, the trial court was justified in concluding the remark either was not made or had no effect on the verdict. (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1463.)

Alteration Of Area Lighting Before Jury Viewed Crime Scene During First Trial

Defendant's second argument on appeal is that the district attorney failed to preserve material evidence by ordering or allowing the lighting in the vicinity of the crime to be improved just prior to the jury's view of the crime scene during the first trial. He contends the court erred in denying his mistrial motions and in refusing a special jury instruction addressing the changes in lighting. Defendant claims the alteration of the lighting impaired his ability to present a defense at his second trial.

Factual background

During defendant's first trial in May 2006, the defense requested that the jury be allowed to view the crime scene under section 1119. The request was granted and a crime scene visit was scheduled between 8:30 p.m. and 9:00 p.m. on Monday, May 8, 2006, about one hour after sunset, when the lighting would approximate the lighting at the time of the crime.

Before the viewing, on May 5, 2006, the district attorney handling the trial telephoned Tim Larsen, assistant general counsel of the Housing Authority, to warn him there was "an issue concerning lighting" in the area and that a jury was about to visit the scene. He did not instruct Larsen to repair or replace the lights; he specified the objective was to "emulate the lighting conditions of October 2005," although Larsen did not know what those conditions were.

Larsen immediately set about to fix the lighting problem, ostensibly out of concern for the safety of the judge and jury during their crime scene visit. He sent a crew of six or seven workers to the crime scene to repair all the broken and non-functioning lights.[20] Those workers spent the whole workday on Friday, May 5, replacing light bulbs and repairing light fixtures in the vicinity. They replaced "a lot" of light bulbs, a "bunch" of them, "boxes."

They came back on Monday to finish the job. One 28-watt fluorescent light fixture was replaced with a 52-watt incandescent fixture, but the new fixture did not provide a stronger light.

On May 8, before the jury's crime scene visit, defense counsel moved for a mistrial due to the lighting fiasco. The district attorney argued: "I simply informed the Housing Authority, I informed the police department to make sure security was out there, that we were bringing the Court out there and our specific goal was to emulate the lighting conditions on October 14, 2005. It was not my intention to change any of the lighting conditions to add light that wasn't there before." Based on the prosecutor's description of his interactions with the Housing Authority, the court concluded there had been no misconduct.

The jury viewed the crime scene on Monday evening, as scheduled. At the direction of the defense, and without objection by the prosecutor, some of the lights were turned off and others were covered to approximate the crime scene lighting. Defense

[20] As we read the record, these were lights on the buildings within the housing projects, not streetlights.

counsel insisted later, however, that additional lights had been weaker or nonfunctional at the time of the shooting.

On May 9, testimony was taken concerning the changes made to the lighting, after which the court denied a renewed mistrial motion. Although it was clear that the lighting in the area had been substantially altered, there was no testimony establishing which lights that had been operational at the time of the crime.

The prosecutor argued "[a]nything that was changed is easily remedied as we did yesterday." "[W]e asked the Defense for their input in terms of which lights they wanted turn[ed] off. We went through their list, turned off every light, and did everything we could to bend over backwards in order to ensure that the scene was what the Defense . . . requested."

The court found there had been no inappropriate conduct by the district attorney, from which we infer a finding of no bad faith on his part. "The Court finds that there's been no tampering or improper behavior on the part of [the prosecutor]. Having been at the scene yesterday and seen certain lights covered at the request of the Defense with no opposition as to anybody as to any lights Defense wanted covered was covered."

The court then reviewed with counsel a DVD of the scene taken on October 14, 2005. Defense counsel claimed the lighting at the scene when the jury was there differed from the lighting at the time of the crime. She focused on three particular lights that she claimed were on when the jury viewed the scene that were not on October 14. The court responded, "And two of those lights three of those lights I saw personally either covered, two of them I saw covered, and one of them I saw being dismantled in one form or another . . . ."

The court upbraided defense counsel: "[Y]esterday at the scene, your investigator asked for certain lights to be changed. Before we went out there we agreed on what lights would be turned off. 33 was one of the lights you were complaining of. It was turned off. [¶] When we got to the scene, your investigator said two particular lights need to be covered. Those lights were covered even though one of those lights appeared on the videotape to actually have been on on the day of the event. [¶] So in order to make

the location as close to replicating a situation on October 14th, we did what your investigator [asked] . . . so that the scene could be as close to that as [*sic*] October 14th."

On May 10 defense counsel again moved for a mistrial, which was denied.

On May 11, defense counsel submitted a special jury instruction, which was patterned after CALCRIM No. 306 (Untimely Disclosure of Evidence). The instruction would have told the jury that "all the lighting at this location had been repaired and replaced with higher wattage lighting." It would have further instructed the jury, "[i]n evaluating the weight and significance of that evidence, you may consider the effect, if any of the [district attorney's] failure to disclose" his phone call to the Housing Authority. The special instruction was denied.

The court again stated, "[W]e made the adjustments according to your investigator and at your request and according to whatever was on your list to be turned off we turned off. It was turned off." The lighting was "as close as we could possibly get it to October 14, 2005." As noted above, the first trial ended with a hung jury.

During the second trial defense counsel did not request a crime scene visit. She made no statement indicating she had changed her mind because of the alteration of the lighting in the area, nor did she give any indication that defendant could not receive a fair trial in the absence of a crime scene visit. She made no claim of prosecutorial misconduct during the second trial in relation to the alteration of the lighting. She made no claim that the change in lighting hampered her ability to mount a defense, much less that it had deprived defendant of vital evidence or a fair trial.

Several witnesses testified about the poor lighting at the scene. Ridout herself said the lighting was "pretty dim." Other witnesses testified it was "real dark," "dark in the parking lot," and the "lights in the parking lot didn't really work to keep the cul-de-sac lit up." They also noted that some streetlights were not operational. Defendant's expert testified about the negative effect of poor lighting, and streetlights in particular, in making an accurate identification, and specifically on the loss of color perception and fine details in such lighting.

Defense counsel used the poor lighting in her opening statement, noting that the "lighting is so bad there that after this incident occurred more lights were put in and a higher wattage was put in for liability of the city because they didn't want the city to be liable for any further accidents there." She also emphasized the dim lighting during closing arguments, including showing photographs to the jury to demonstrate that certain lights on the buildings were not lit at the time of the crime.

Legal analysis

Defendant contends the prosecution violated due process and deprived him of his constitutional right to present a defense in violation of the Fifth, Sixth, and Fourteenth Amendments when it ordered or allowed the lighting in the area to be altered, asserting that it effectively destroyed potentially exculpatory evidence.

The Attorney General claims the absence of an objection or motion in the second trial forfeits any right to claim on appeal that the alteration of lighting deprived defendant of his fundamental due process rights. We agree.

The seminal case on evidence preservation is *California v. Trombetta* (1984) 467 U.S. 479 (*Trombetta*), which dealt with the destruction of breath samples after they had been analyzed in drunken driving cases. (*Id.* at p. 481.) There the court said, "Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, [citation], evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (*Id.* at pp. 488-489.)

The state's responsibility is further limited when the defendant's challenge is to "the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." (*Arizona v. Youngblood* (1988) 488 U.S. 51, 57 (*Youngblood*).) The high court refused to impose "on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a

particular prosecution." (*Id*. at p. 58.) "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." (*Ibid.*) The requirement to show bad faith applies even where the evidence is central to the case and has been requested in discovery. (*Illinois v. Fisher* (2004) 540 U.S. 544, 547-549.)

Of central importance to the court's ruling below was its evident—and oft-repeated—belief that the problem had been remedied by covering and extinguishing some of the lights in accordance with defense instructions so as to replicate the crime scene. Even assuming the lighting at the crime scene "possess[ed] an exculpatory value that was apparent *before* the evidence was destroyed," the first of the *Trombetta* materiality factors—a point that is certainly debatable[21]—the court's implicit finding that replication of the crime scene was still possible properly disposed of the matter. (*Trombetta*, *supra*, 467 U.S. at p. 489, italics added.)

The trial court implicitly found the lighting at the crime scene visit constituted "comparable evidence" within the meaning of *Trombetta*, *supra*, 467 U.S. at p. 489. The court was present at the crime scene and reviewed the crime scene video. We are not in a position to second-guess its finding on such an issue. In reviewing the denial of a *Trombetta* motion, we apply the substantial evidence standard to factual determinations such as the apparent exculpatory value of the evidence that was destroyed, the availability of comparable evidence from other sources, and the absence of bad faith. (*People v. Roybal* (1998) 19 Cal.4th 481, 510.)

Of course, we would be naïve to ignore the possibility that the prosecutor was motivated by ill purposes when he called to report the unsafe lighting. That lighting conditions at the time of the shooting would prove crucial to the trial was front and center

[21] Lighting conditions at the crime scene could have aided either the defense or the prosecution depending entirely upon the jurors' assessment of visibility at various distances. It is certainly arguable that such evidence was "potentially exculpatory" rather than exculpatory on its face, and thus subject to *Youngblood*'s bad faith requirement. (*Youngblood*, *supra*, 488 U.S.at pp. 57-58.)

from the outset, being a chief point of contention at the first trial and the second. However, on the present record and in the context of a direct appeal we would uphold the trial court's assessment of good or bad faith if we were to address the issue. The substantial evidence standard applies to a trial court's determination, following a factual inquiry, whether the state acted in bad faith in failing to preserve evidence. (*People v. Memro* (1995) 11 Cal.4th 786, 831; *People v. Velasco* (2011) 194 Cal.App.4th 1258, 1262.) The court's implicit finding of no bad faith was supported by substantial evidence in that Larsen testified the district attorney never asked him to change the lighting.

More to the point, having failed to renew any objection during the second trial, the defense is precluded from seeking on this appeal the extreme relief proposed—dismissal of the charges—on the basis of a problem that appears to have been curable. Again we emphasize that the changes in lighting, the jury's view of the crime scene, and the defendant's request for a remedial instruction all occurred during the first trial. We review the judgment from the second trial, where none of those issues was raised or ruled upon. The fact that defense counsel did not seek a crime scene visit during the second trial may suggest, as a tactical matter, she did not believe the viewing would aid the defense. It does not inevitably suggest, as defendant seems to believe, that the crime scene had been irremediably altered. The issue has been forfeited.

DISPOSITION

The judgment is affirmed.

_____
Richman, J.

We concur:

_____
Kline, P.J.

_____
Lambden, J.